In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 163

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., APPELLANTS

v.

RINGSBY TRUCK LINES, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

This memorandum is submitted in response to this Court's order of October 23, 1967, requesting the United States and the Interstate Commerce Commission—

> * * * to address themselves further to the issue of mootness in this case, in particular to the statement in their memorandum that the issue with respect to the restraining order entered by the District Court "is not moot because it would affect appellants' claims for restitution of charges paid under the increased rates."

The Commission's order in this case directed the cancellation of a general 3 percent increase in trans-

283-737—67

continental rates filed by some 1,400 motor common carriers (326 I.C.C. 397). The new rates went into effect before the Commission's decision and have remained in force ever since because the Commission's order never became effective. On suit by the carriers, the district court issued a temporary restraining order enjoining the Commission's cancellation of the increase. After hearing, the district court vacated and set aside the Commission's order and remanded the matter to the Commission for clarification of its reasoning (J.S. A1–A14). The Commission reopened the case promptly and, less than one month after the district court's decision, it again ordered the rate increase cancelled (329 I.C.C. 420). However, the new order provided that the filing of a complaint in the district court challenging it would stay its effectiveness (329 I.C.C. at 428). Such a suit was promptly filed and is still pending in the district court.

The question of mootness bears upon two aspects of this appeal: (1) whether the district court erred in setting aside the Commission's order on January 5, 1967; and (2) whether it erred in restraining enforcement of the Commission's order on September 9, 1966, until it remanded the case. In our memorandum suggesting affirmance, we stated that this Court might appropriately affirm the district court's judgment summarily because the first issue is moot and the second issue presents no substantial question warranting review. Upon reconsideration, we are satisfied that both questions are substantially moot.

1. No rights or remedies of appellants will be foreclosed if this Court dismisses their appeal or affirms

the judgment below: all issues as to the merits of the Commission's cancellation of the rate increase can be considered in the pending district court action to review the Commission's second order, and, if necessary, on appeal from that judgment. The district court did not pass on any issue involving the merits of the increased rates; it held only that "the Court is unable to determine the real reasons for the Commission's holding * * *" (J.S. A–13), and remanded for clarification. Thus, it did not decide whether the existing record would support the Commission's ruling that the motor carriers had not sustained their burden of proving the increased rates to be just and reasonable. Higher rates paid under a court order staying the effectiveness of a Commission rate determination pending review proceedings are subject to restitution [1] if the Commission's order is ultimately sustained. *Atlantic Coast Line* v. *Florida*, 295 U.S. 301.[2] Accordingly, the

[1] Restitution is an equitable remedy whereby shippers can recover monies paid under a court order which keeps in effect rates which are ultimately found to be illegal. See *Atlantic Coast Line* v. *Florida*, *supra*, at 309–311; *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 785–786. It is distinct from reparation, which is a statutory remedy (49 U.S.C. 304, 304a; see *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464) not involved here.

[2] In *Coast Line* after the agency's first order requiring increases in rates was set aside for lack of findings (282 U.S. 194), its second order was sustained (292 U.S. 1). Thereafter, this Court held that restitution should be denied for the period of the first order, during which the higher rates were paid, based upon a consideration of the grounds set forth in the Commission's second order. Similarly, here, if the second Commission order requiring cancellation of the increases is sustained, restitution may be granted from the time the first cancellation order was restrained.

district court's order does not bar appellants from recovering the higher charges they have paid, if the Commission's order, as clarified on remand, is upheld in the case now before the district court.

Upon these considerations, we have characterized the court's remand of January 5, 1967, as moot. To be sure, if this Court were now to reverse the judgment and, at the same time, affirm the Commission's order, appellants might obtain restitution sooner. But, in the present posture of the case, it appears to us most unlikely that the Court would itself review the merits of the Commission's order, and a remand to the district court would delay, not hasten, the ultimate decision. At all events, the only possible consequence of favorable action here would be to affect the date on which appellants' claim for restitution becomes collectible; their right to relief, if any, and the extent of the recovery, will remain the same if the present appeal is dismissed or the judgment below affirmed. In those circumstances, we suggest it would be appropriate to treat the present appeal as moot, or, at best as presenting a question of such minimal practical importance and legal significance as not to merit review in this Court. See *Boston & Maine R. Co.* v. *United States*, 358 U.S. 68.

2. Contrary to our previous submission, the issues raised as to the validity of the district court's restraining order are moot in every sense. That order, which is not appealable, has been supplanted by the court's remand order and the Commission's second order. If the Commission's cancellation of the higher rates is ultimately held to be valid, appellants will be

entitled to restitution for all excessive charges, including higher rates paid while the temporary restraining order was in effect. See *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 144–146; *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 785–786; *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 309.

The appeal should be dismissed or the judgment below summarily affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

DECEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967